

DISSENTING OPINION BY NAKAYAMA, J.

I respectfully dissent. Inasmuch as I believe the majority misapplies Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), when addressing Respondent's preservation argument, majority opinion at 22-23, and the majority chooses to intrude on the adversarial system in order to resolve the issue of waiver of a fundamental right through a stipulation of facts, I would hold that the Intermediate Court of Appeals ("ICA") did not gravely err by affirming Petitioner's conviction.

The majority rejects the Respondent's assertion that Petitioner waived the admissibility issue of his counsel's stipulation because Petitioner failed to object. Majority opinion at 22-23. In its rejection, the majority attempts to draw an inference of relevance in precedent between this case and Tachibana. In Tachibana, this court discussed which approach "will best protect defendant's rights while maintaining the integrity of the criminal justice system." 79 Hawai'i at 234, 900 P.2d at 1301. In rejecting the "demand" rule, this court "decline[d] to adopt a rule which places . . . burdens on the exercise of a fundamental constitutional right[,]" inasmuch as "[c]ourts using the demand rule will not entertain a post-trial challenge based on the right to testify." 79 Hawai'i at 233-34, 857 P.2d at 1300-01. Tachibana, however, is inapposite insofar as the "three primary approaches" discussed by the majority, majority opinion at 17-20, are approaches "that courts throughout the country have taken when defendants have claimed that their attorneys deprived them of their right to testify."<sup>1</sup> 79 Hawai'i

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<sup>1</sup> Indeed, the defendant in Tachibana "frequently expressed his desire to testify" to his counsel during trial recesses, and his "defense team  
(continued...)

at 233, 900 P.2d at 1300 (block format and citation omitted) (emphasis added). No such claim has been made by Petitioner against his counsel in the instant case.

Moreover, contrary to its interpretation, the language emphasized and relied on by the majority illustrates the tenuous situation a defendant finds himself when his counsel takes away his constitutional rights and the defendant "may not know that an objection must be made during trial or that right is forever lost." Majority opinion at 23 (quoting and emphasizing certain portions of Tachibana, 79 Hawai'i at 234, 900 P.2d at 1301). Indeed, a defendant-client looks to his counsel to provide guidance and keep him informed as to what his rights are, and how best to proceed in exercising those rights. This relationship between attorney and client is a foundational principle of our rules of professional responsibility, which compels his counsel, as "advisor," to "provide[] a client with an informed understanding of the client's legal rights and obligations and explain[] their practical implications." Hawai'i Rules of Professional Responsibility ("HRPR") pmb1. 2 (2007).

A defendant's counsel has "the duty to inform a defendant of the existence of certain constitutional rights[,]" inasmuch as "a trial court can justifiably presume, based on a

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<sup>1</sup>(...continued)  
decided as a tactical matter that it would be best not to call Tachibana as a witness." 79 Hawai'i at 229, 900 P.2d at 1296. Being brought to its attention, the trial court found and concluded that "defense counsel's decision to rest Tachibana's case without presenting Tachibana as a witness, which was contrary to the wishes of Tachibana, violated Tachibana's right to testify in his trial." Id. at 239, 900 P.2d at 1306 (quotation marks and brackets omitted).

defendant's conduct or silence, that a defendant is aware of and has waived certain rights." Tachibana, 79 Hawai'i at 240, 900 P.2d at 1307 (Nakayama, J., dissenting) (citing State v. Silva, 78 Hawai'i 115, 890 P.2d 702 (App. 1995); State v. Savage, 120 N.J. 594, 577 A.2d 455 (1990)). A court is not obligated to engage in a mandatory colloquy with every defendant to ensure that he, notwithstanding his counsel's silence or conduct, knowingly and intelligently waived each and every one of his constitutional rights. Tachibana, 79 Hawai'i at 241, 900 P.2d at 1308 (Nakayama, J., dissenting). It is instead primarily the obligation of counsel to advise a defendant on whether to waive his constitutional rights, and the tactical advantages and disadvantages of each choice. Id. ("For the court to discuss the choice with the defendant would intrude into the attorney-client relationship protected by the sixth amendment."); see HRPR pmb1. 2.

The majority's holding represents a logical progression in this court's continued intrusion into and erosion of this relationship, inasmuch as the gravity of the majority's opinions in both Tachibana and the instant case is that a court is better suited to protect the constitutional rights of a defendant than his own counsel--whether his counsel utters a word or not, and even if his counsel's utterance or silence directly infringes on his constitutional rights. Unlike the defendant's silence in Tachibana, defendant's counsel in the instant case stipulated to the prior convictions in a clever show of gamesmanship, which sub silentio implicated the defendant's constitutional right to have

each element proven beyond a reasonable doubt.

While I share in the majority's decision that a limiting jury instruction should have been given, I must dissent from the majority's disposition because (1) the majority misapplies Tachibana in addressing Respondent's preservation argument, and (2) I decline to condone a course of conduct that encourages clever trial tactics and gamesmanship by counsel at the expense of protecting and preserving her client's constitutional rights. For the foregoing reasons, I would affirm the ICA's February 6, 2007 judgment, which affirms the family court of the second circuit's September 13, 2005 judgment of conviction.

*Auna C. Nakayama*